Supreme Court, U. S.
FILED
FEB 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1164

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,
Appellants

v.

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

JURISDICTIONAL STATEMENT

Of Counsel:

MEHAFFY, WEBER, KEITH & GONSOULIN
Beaumont, Texas

DAVIS & DELEON
Austin, Texas

VICTOR J. ROGERS, II
Houston, Texas

Counsel of Record:

ROBERT Q. KEITH
MEHAFFY, WEBER, KEITH & GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

ROBERT Q. KEITH
BRIAN R. DAVIS
VICTOR J. ROGERS, II
ARTHUR R. ALMQUIST
Attorneys for Appellants

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement of the Case	3
The Questions Are Substantial	11
I. Section 2.02 Denies Appellant the Equal Protection of the Laws.	12
II. The Determination That There is a Rational Basis for § 2.02 is Clearly Erroneous.	14
III. Section 2.02 Denies Appellant Due Process of Law.	15
IV. Section 2.02 Infringes Appellant's First Amendment Rights.	17
Certificate of Service	19
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1

LIST OF AUTHORITIES

CASES

	Page
Baird v. Arizona, 401 U.S. 1 (1971)	16
Bates v. Little Rock, 361 U.S. 516, 523 (1960)	16
Bates v. State Bar of Arizona, ____U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)	17
Campbell v. Hussey, 368 U.S. 297, reh. den. 368 U.S. 1005 (1961)	2
Carter v. Stanton, 405 U.S. 669 (1972)	2
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	16
Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960)	2
Gibson v. Berryhill, 411 U.S. 564 (1973)	5, 11, 15
Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967)	16, 17

CASES

	Page
Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973)	13
NAACP v. Alabama, 357 U.S. 449 (1958)	16
New Orleans v. Dukes, 427 U.S. 297 (1976)	14
United Mine Workers v. Illinois Bar. Assoc., 389 U.S. 217 (1967)	12
United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973)	16
Vlandis v. Kline, 412 U.S. 441 (1973)	16
Wall v. American Optometric Association, Inc., N.D. Ga. 1974 (3-Judge Court), 379 F.Supp. 175, aff'd 419 U.S. 888 (1974)	5
Williams v. Rhodes, 393 U.S. 23 (1968)	12, 13

UNITED STATES CONSTITUTION

First Amendment	2, 3, 7, 10, 13, 14, 16, 18
Fourteenth Amendment	2, 3, 6, 7, 11, 18

UNITED STATES STATUTES

28 U.S.C. Section 1253	2
28 U.S.C. Section 1331	2
28 U.S.C. Section 1343(3) and (4)	2, 6
28 U.S.C. Section 2201	2
28 U.S.C. Section 2281	2, 6, 7
28 U.S.C. Section 2284	2
42 U.S.C. Section 1983	2, 6

REVISED CIVIL STATUTES OF TEXAS

Article 4552 (Texas Optometry Act)

Section 2.02	1, 3, 6, 7, 8, 12, 13, 14, 15, 17
Section 2.09	3
Section 2.10	3, 4
Section 2.14	3, 4
Section 3.01	3, 4
Section 3.06	3, 4
Section 3.07	3, 4
Section 4.04	3, 4
Section 5.09	7, 18
Section 5.12	6
Section 5.13(d)	6, 7
Section 5.13(e)	8
Section 5.15(e)	6, 7, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. _____

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually and as President of the TEXAS SENIOR CITIZENS ASSOCIATION, PORT ARTHUR, TEXAS CHAPTER,
Appellants

v.

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN, O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W. DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their official capacity as members of THE TEXAS OPTOMETRY BOARD; and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

JURISDICTIONAL STATEMENT

Appellants appeal from that limited portion of the judgment entered October 27, 1977 by a three-judge court of the United States for the Eastern District of Texas upholding the constitutionality of Section 2.02 of the Texas Optometry Act, article 4552, Revised Civil Statutes of Texas, and denying the prayer for injunction prohibit-

ing the enforcement of said statute, and submit this statement to show that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 438 F.Supp. 428. The opinion and judgment are reproduced as Appendix A.

JURISDICTION

This suit was brought under the First and Fourteenth Amendments of the United States Constitution together with 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2281, and 2284 and 42 U.S.C. § 1983. The judgment of the District Court was entered October 27, 1977 and notices of appeal were filed in that court by Appellants on December 21, 1977. Copies of said notices of appeal are attached hereto as Appendix B. On December 20, 1977 and December 22, 1977, Appellees also filed notices of appeal.

This appeal is from a final order of a three-judge court properly constituted under 28 U.S.C. § 2281, denying in part requested injunctive relief restraining the enforcement of a state statute.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Campbell v. Hussey*, 368 U.S. 297, reh. den. 368 U.S. 1005 (1961); *Carter v. Stanton*, 405 U.S. 669 (1972).

QUESTIONS PRESENTED

1. Does § 2.02 of the Texas Optometry Act, by requiring that two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Is the determination of the district court that there is a rational basis for § 2.02's classification of optometrists according to their membership in a particular organization clearly erroneous and refuted by the evidence?

3. Does § 2.02 of the Texas Optometry Act, by requiring that two-thirds of the Texas Optometry Board be members of the Texas Optometric Association, deprive Appellant, Dr. Rogers, of due process of law as guaranteed by the Fourteenth Amendment?

4. Does the requirement of § 2.02 that two-thirds of the Texas Optometry Board be members of the Texas Optometric Association operate indirectly to infringe upon the Appellants', Texas Senior Citizens Association, Port Arthur, Texas Chapter, First Amendment rights to receive valuable commercial information?

STATUTES INVOLVED

Sections 2.02, 2.09, 2.10, 2.14, 3.01, 3.06, 3.07 and 4.04 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas are reproduced as Appendix C.

STATEMENT OF THE CASE

Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, hereinafter re-

ferred to as the Act, requires that two-thirds of the Texas Optometry Board be "members of a state optometric association which is recognized by and affiliated with the American Optometric Association". The Texas Optometry Board, hereinafter referred to as the Board, is the state regulatory body charged with supervision of the practice of optometry in the State of Texas. The Act provides that the Board may bring suit in its own name to enjoin any violation of the Act, § 2.10, and gives the Board the power to hold hearings and issue subpoenas concerning matters within its jurisdiction. § 2.10. The Board is charged with examining candidates for licenses, §§ 3.01 and 3.06, and determining who shall be licensed to practice optometry. § 3.07. The Board is also given the power to revoke the license of a practicing optometrist. § 4.04. While the Board has no rule making authority, § 2.14, the Board has adopted the practice of issuing "Interpretations" of the provisions of the Act.

The *only* state optometric association in Texas that is recognized by and affiliated with the American Optometric Association is the Texas Optometric Association, Inc., hereinafter referred to as TOA. Thus, two-thirds of the members of the Texas Optometry Board *must* be members of TOA. On May 12, 1976, there were 934 licensed Texas optometrists residing in Texas and of that figure only an outside *maximum* of 482, or 52%, were TOA members actively engaged in the practice of optometry. Even though only half of the state's optometrists are members of TOA they are insured of a perpetual two-thirds majority on the Texas Optometry Board.

The relatively even split between TOA optometrists and non-TOA optometrists reflects the decades old con-

flict between two Texas and national optometric factions over the mode of practice. The Alabama and Georgia representatives of these competing factions in the practice of optometry were the parties in interest in the cases of *Gibson v. Berryhill,* 411 U.S. 564 (1973) and *Wall v. American Optometric Association, Inc.,* N.D. Ga. 1974 (3-Judge Court), 379 F.Supp. 175, aff'd 419 U.S. 888 (1974). Most TOA members are members of the faction that prefers to refer to its members as "professional" optometrists. The "professional" optometrists have always vigorously insisted that commercial merchandising techniques have no place whatever in the rendition of quality visual health care. This view point is crystallized in the American Optometric Association (AOA) Code of Ethics and Rules of Practice, which rules are recognized and enforced by TOA and which prohibit any form of advertising, whether it is price advertising or use of any other commercial merchandising techniques. AOA Code of Ethics, III Section C. (Exhibits 25 and 26 to the deposition of Dr. N. Jay Rogers). Thus, all TOA members are prohibited from utilizing any form of advertising and an optometrist may not become a member of the TOA if he advertises.

The opposing faction is comprised of the "commercial" optometrists of whom Dr. Rogers is a successful and respected pioneer. Key characteristics of "commercial" optometry include the practice of optometry in multiple offices and under trade names, the use of media advertising, including price advertising, of opthalmic goods and services, an efficient and economical division of professional and para-professional patient services, generally far lower prices to the public, and less "professional" appearing locations, offices and office procedures. Because of their

mode of practice, the "commercial" optometrists of Texas, including plaintiff, historically have been ineligible for AOA and TOA, and remain ineligible to this day for AOA and TOA membership due to their non-conformity to the restrictions set forth in the AOA Code of Ethics and Rules of Practice.

This dispute between the two factions is confined to questions of modes of business in an economic sense and is not related to any questions concerning patient care. There is no dispute over the proper way to examine a patient's eyes or how to prescribe for a particular eye disorder. (Deposition of Dr. Sal Mora, at pp. 10-11, taken on February 5, 1976). In fact, § 5.12 of the Act requires that all eye examinations shall include certain steps. Even Dr. Richard Friedman, a past president of the TOA and a defendant herein as a member of the Board, testified that there is no disagreement between the two factions as to proper examination for refraction or prescription. (Deposition of Dr. Richard Friedman, at pp. 14-15, hereinafter Friedman depo.).

On August 25, 1975, Appellant, Dr. N. Jay Rogers, O. D., brought this case against the remaining five members of the Texas Optometry Board pursuant to, *inter alia*, 42 U.S.C. § 1983 and 28 U.S.C. § 1343, § 2281 et seq., assailing the constitutionality of § 2.02 of the Act on the grounds that such an arbitrary and irrational classification violates his Fourteenth Amendment rights to equal protection of the laws and due process of law. Fourteenth Amendment attacks on § 5.13(d) and § 5.15 (e) of the Texas Optometry Act were also made. The convocation of a three-judge district court and a permanent injunction against enforcement of these statewide

statutes were sought. A three-judge court was properly convened pursuant to 28 U.S.C. § 2281 to consider the substantial federal constitutional claim stated in Dr. Rogers' complaint.

On June 11, 1976 a Complaint in Intervention was filed by W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, hereinafter referred to as Senior Citizens, joining Dr. Rogers in his attack on the constitutionality of §§ 2.02, 5.13(d) and 5.15(e) of the Act raising First and Fourteenth Amendment grounds, and also attacking the constitutionality of § 5.09 of the Texas Optometry Act which prohibits price advertising by optometrists on the grounds that such prohibition of advertising denies intervenor's protected First Amendment right to receive valuable commercial information.

On September 13, 1976, the Texas Optometric Association, Inc. filed a petition in intervention in support of the defendant, Texas Optometry Board members.

On October 27, 1977, the three-judge court entered its final judgment restraining and enjoining the defendants from enforcing § 5.09(a) and § 5.13(d) of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas and declaring those sections unconstitutional under the First Amendment of the United States Constitution. The court held that § 5.15(e) does not violate the First Amendment and that the § 2.02 of the Act does not violate the First and Fourteenth Amendments of the United States Constitution since there are several rational bases for the classification and denied injunctive relief.

Plaintiff and intervenor filed a notice of appeal as to that portion of the judgment upholding the constitutionality of § 2.02 and § 5.15(e) of the Act. However, Appellants would dismiss their appeal from that portion of the judgment upholding the constitutionality of § 5.15 (e) since the court has construed that section as having the clear purpose of encouraging the free flow of commercial information to consumers. Appellants reserve the right to again question the validity of § 5.13(e) should the Texas Optometry Board or the courts of the State of Texas construe the section so as to restrict the free flow of commercial information to consumers.

In upholding the arbitrary classification of § 2.02 that gives a particular special interest group control over the practice of optometry in Texas, the three-judge court deferred to three "rational bases for the requisite board composition" that were suggested by TOA. 438 F.Supp. at 432. However, the evidence produced at trial, including much evidence that came directly from TOA members, effectively refutes all of the proferred "rational bases".

First, as to the assertion that TOA members are more likely to be economically independent than non-TOA members, Dr. Hugh Sticksel, Jr., one of the defendants, testified that a TOA member who is practicing in affiliation with other TOA members could be subjected to economic control from the other TOA members just as a non-TOA member might be subject to economic control from other individuals. (Deposition of Dr. Hugh Sticksel at 43-47). Dr. Sticksel's testimony indicates that if economic independence is the basis for distinguishing between optometrists the only rational distinction would

be between a solo practitioner and a practitioner who is affiliated with other individuals and that a TOA member is subject to economic controls just as a non-TOA member.

Second, the assertion that TOA members are more prone than others to enforce the Optometry Act is also clearly refuted by the evidence. Dr. Richard Friedman, chairman of the Texas Optometry Board and former president of the TOA testified that the fact of membership in the TOA does not make an optometrist more likely to enforce the law. (Friedman depo. at 55). In fact, Dr. Friedman testified that he routinely violated § 5.15(e) of the Act by failing to inform the patients that they could take their prescription to a dispensing optician. He testified that this Board, with a four member TOA majority, has never taken any action for violation of § 5.15(e) even though he believed very few optometrists were following the requirements of this section. (Friedman depo. at 114-115). There can be no more graphic proof that TOA members are as likely as any other optometrist to be lax in the enforcement of the Act when it is in their economic self-interest to do so.

Third, the assertion that TOA members are more likely to emphasize the highest quality of eye care as opposed to the non-TOA member is equally without basis in the evidence. Dr. Friedman testified that he would expect a patient to get the same proper examination or refraction and prescription at Dr. Rogers' office as that patient would at Dr. Friedman's office. (Friedman depo. at 14-15). But there was even more telling evidence at trial that reflects the true emphasis that the TOA places on the highest quality of eye care. As of May 11, 1968, the

TOA implemented a Practice Evaluation System for membership in the TOA. (Exhibit to the affidavit of Stanley Boysen). That system has a maximum of 100 points that can be amassed and if a minimum of 70 points are amassed an optometrist can qualify for membership. Of the points that can be scored an optometrist can receive 10 points for meeting the minimum standards for visual examination promulgated by statute and 6 points for attending a *TOA approved* educational meeting annually. Thus, of 100 points only 16 directly relate to the actual quality of eye care provided by the optometrist. The other 86 possible points show the true emphasis of the TOA. For example, an optometrist can score 25 points for officing in a "professional" location but only 5 points for any other street location with "unprofessional" signs and "public presentations" as displays. An optometrist can score 20 points for no "unprofessional media releases". However, an optometrist fully exercising his protected First Amendment right to advertise would be entitled to no points at all and only six points if he advertises in every medium except radio and television. Ten points can be scored if only "professional" signs are used, 15 points for no displays, and 10 points for practice only in the optometrist's own name. Clearly, the emphasis is on creating the "professional" facade for the practice of optometry and not on quality eyecare.

The asserted rational bases for giving TOA members a perpetual two-thirds majority on the Optometry Board clearly have no basis in the evidence. The evidence produced at trial established that there could be no conceivable rational basis for the classification of optometrists

on the basis of membership in a particular organization and that the statutory classification is wholly arbitrary.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are closely related to the issues involved in the case of *Gibson v. Berryhill*, 411 U.S. 564 (1973). The primary issue in *Gibson* concerned the propriety of individuals with substantial pecuniary interest (members of the Georgia Optometric Association which is the equivalent to the TOA) adjudicating matters concerning other members of the profession, the non-GOA optometrists. Such pecuniary interest was held to deny the appellants their right to procedural due process of law.

While this case does not involve pending or immediately threatened license revocation proceedings it does address the broader question of whether a legislative classification that mandates that two-thirds of the Texas Optometry Board be members of a particular special interest organization operates to deny the other members of the profession their protected Fourteenth Amendment rights to the equal protection of the laws and due process of law in that the classification infringes on their rights to associate to exercise political influence on the Board and is wholly arbitrary.

This appeal also addreses the important constitutional question of whether a state may impose a regulatory scheme on a profession that has the indirect effect of impairing the rights of consumers to receive valuable commercial information.

I. Section 2.02 Denies Appellant the Equal Protection of the Laws.

Section 2.02, in giving the TOA a perpetual two-thirds majority on the Board, has created a classification based solely on membership or non-membership in a particular organization. The statute itself does not prohibit optometrists from forming other organizations to promote their goals and ideals concerning the proper mode of practice for optometrists. However, the statute does insure that any organization other than the TOA will always have to deal with a regulatory board that is dominated by a particular group's viewpoint.

In *Williams v. Rhodes*, 393 U.S. 23 (1968) a statutory scheme that discriminated against minority political parties was held to be a violation of the Equal Protection Clause as a denial of the right to association since "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes". 393 U.S. at 31. In the same way, the rights of optometrists to organize to express their goals, both political and professional, mean little if they are to be forever governed by a Board with a TOA majority.

While *Williams* arose in the context of the political process the right to associate is not limited to the political arena. In a far different context, the right to associate was held to have been denied by a prohibition against the unauthorized practice of law that prevented a union from employing attorneys to assist its members in legal matters. *United Mine Workers v. Illinois Bar Assoc.*, 389 U.S. 217 (1967).

The State may infringe on First Amendment rights only when it shows a compelling state interest in doing so. *Williams v. Rhodes*, 373 U.S. at 31. The state would assert that it has a legitimate interest in regulating the optometric profession and that the statutory classification is imposed to maintain quality eye care and prevent economic tie-ins. However, the means the state uses cannot be permitted to encroach upon significant First Amendment rights when less restrictive means are available to satisfy its interests. *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973). Section 2.02 already prohibits optometrists from serving on the Board if they are members of the faculty at a college of optometry or if they are agents of or have financial interests in any wholesale optical company. The state could legitimately place other restrictions on who may serve as Board members such as limiting the Board members to individuals who have practiced for a specified number of years. Such restrictions, that would apply to all optometrists equally, are available to the state to further its interests. The state may not, however, further its interests at the expense of important associational freedoms as it has done.

The statutory two-thirds majority given to the TOA insures that the practice of optometry in Texas will continue to be dominated by individuals who are unalterably opposed to any form of advertising by optometrists. While the Board can no longer rely on a statutory prohibition of advertising as a ground for revocation of the license of an optometrist there remain many other grounds for the Board to institute revocation proceedings. The TOA-dominated Board can still use advertising as the trigger that prompts them to investigate an optometrist

to see if he has run afoul of any statutory requirements. The unequal treatment of the statutory scheme that gives a favored position to an organization that is violently opposed to advertising will certainly have a "chilling effect" on an optometrist's exercise of his First Amendment right to advertise. When such an optometrist advertises he is in effect challenging a basic belief of the TOA Board members and must be prepared to bear the force of their reaction to that challenge. That impact on First Amendment freedoms can be tolerated only when the state can show the most compelling interest and the state has not produced any evidence of a compelling interest to justify the unequal treatment afforded to non-TOA optometrists. Section 2.02 therefore denies Appellant the equal protection of the laws.

II. The Determination That There is a Rational Basis for § 2.02 is Clearly Erroneous.

Although Appellant maintains the § 2.02 can be upheld only if the state shows a compelling interest, the district court applied only a "rational basis" test and determined that there was a rational basis for the statutory classification. Without conceding the appropriateness of such a test in this case, the determination of the district court was not supported by the evidence at trial. The evidence produced by the plaintiff negatived every conceivable basis for the statutory distinction between TOA and non-TOA optometrists, as discussed more fully, supra, and the evidence establishes that the classification is wholly arbitrary. *New Orleans v. Dukes*, 427 U.S. 297 (1976). The determination of the district court that

there is a rational basis for the classification is clearly erroneous and must be overturned.

III. Section 2.02 Denies Appellant Due Process of Law.

Section 2.02 presents a statutory scheme that insures that in any license revocation proceeding a non-TOA optometrist will be judged by a predominately TOA Board whose members have substantial pecuniary interests at stake. Under the rationale of *Gibson v. Berryhill, supra,* any such proceeding would violate procedural due process. While this case does not arise in the context of adjudicatory proceedings the factual similarities between this case and *Gibson* are substantial with the TOA occupying virtually the same position as the Alabama Optometric Association did in *Gibson* and possessing the same interest in inhibiting the commercial practice of optometry for their own economic gain. There is no way to handle any future disciplinary hearing to avoid this procedural due process defect in the Board's composition. Therefore, the procedural due process issue is ripe for review and § 2.02 is due to be permanently enjoined.

The procedural due process defects are not the only due process defects with § 2.02. The statute, in effect, creates an irrebuttable presumption that non-TOA members are less qualified to serve on the Board than TOA members. Fitness for service on the Board is conclusively established by membership in a particular organization. Such a scheme invidiously discriminates against the non-TOA optometrists, denying them their fundamental right of association and denying them due process of law.

NAACP v. Alabama, 357 U.S. 449 (1958). These associational rights are protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference". *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

When a statutory scheme arbitrarily favors one class of similarly situated optometrists over another and operates to infringe upon the associational rights of the optometrists it is due to be enjoined as a violation of due process of law. *Vlandis v. Kline*, 412 U.S. 441 (1973), *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973) and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

It is no answer to this denial of due process to say that there is no fundamental right to serve on the Board or even that there is no fundamental right to practice optometry. While such a statement is obviously true, the State may not condition the right to practice optometry or the privilege to serve on the Board on the abdication of an optometrist's First Amendment rights to freely associate with others to further their own ideals and goals. *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967) and *Baird v. Arizona*, 401 U.S. 1 (1971).

In *Keyishian*, a New York statute that made Communist Party membership prima facie evidence, (or a rebuttable presumption) of disqualification for a teaching position was struck down as an overbroad denial of associational rights which may not be proscribed. In this case the presumption is irrebuttable that a non-TOA optometrist is not as qualified to serve as a TOA-optometrist and operates to proscribe associational rights as

surely as did the statute in *Keyishian*. The non-TOA optometrist is thus denied due process of law and § 2.02 must be permanently enjoined.

IV. Section 2.02 Infringes Upon Appellant's First Amendment Rights.

The three-judge court held that Section 5.09(a) of the Texas Optometry Act is unconstitutional under the First Amendment insofar as it prohibits any optometrist from making "any statement or advertisement of price of optometric services or materials". This holding was based on *Bates v. State Bar of Arizona*, ____ U.S. ____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) which clearly was controlling. None of the defendants in this case has appealed from the judgment of the three-judge Court as it pertains to advertising by optometrists.

However, the court's judgment on advertising by optometrists will prove to be only an illusory victory as long as the TOA maintains its statutory two-thirds majority on the Texas Optometry Board. The TOA members of the Board will be individuals who are bound by a Code of Ethics that prohibits them from advertising. They, in turn, have the power to determine which individuals will be allowed to practice optometry in Texas. While the statutes will no longer give them the power to revoke the license of an optometrist simply because he advertises, an optometrist's knowledge that the members of the Board who will sit in judgment of his action are unalterably opposed to and prohibited from advertising will certainly weigh heavily in his decision on whether or not to advertise.

The TOA majority on the Board promulgated an interpretation of § 5.09 that extended beyond the scope of that statute. The vote on that interpretation, Interpretation No. 6, was four to two with the four TOA members of the Board voting for the Interpretation. That vote graphically illustrates that the TOA members are so opposed to advertising that they found it necessary to enlarge upon the anti-advertising statute passed by the legislature. As long as the TOA retains its perpetual majority on the Board it can be expected to make further attempts through "Interpretations" to limit the protected First Amendment rights of optometrists to advertise and consumers to receive the valuable commercial information conveyed by advertising. The two-thirds majority for TOA members is an indirect restraint on the exercise of First Amendment rights by optometrists and correspondingly results in dilution of the Senior Citizen's right to receive commercial information. To prevent the First Amendment from becoming a "hollow promise", statutes that indirectly restrain First Amendment rights cannot be sustained even if they are purportedly enacted "for the purpose of dealing with some evil within the State's legislative competence or even because the laws do in fact provide a helpful means of dealing with such an evil". *United Mine Workers v. Illinois Bar Asso.*, 389 U.S. 217, 223 (1967). Since Section 2.02 serves as an indirect restraint on First Amendment rights of Appellants it cannot be sustained.

Appellants submit that § 2.02 of the Texas Optometry Act violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and infringes upon protected First Amendment rights. The questions pre-

sented by this appeal are substantial and they are of constitutional significance.

Respectfully submitted,

ROBERT Q. KEITH
BRIAN R. DAVIS
VICTOR J. ROGERS, II
ARTHUR R. ALMQUIST

By: _____
Of Counsel

Of Counsel:

MEHAFFY, WEBER, KEITH & GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

DELEON & DAVIS
408 First Federal Plaza
Austin, Texas 78701

VICTOR J. ROGERS, II
3434 One Allen Center
Houston, Texas 77002

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has been furnished to all interested parties this ____ day of February, 1978.

_____

APPENDIX A

Dr. N. Jay ROGERS, Plaintiff,

W. J. Dickinson, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, Intervenor,

v.

Dr. E. Richard FRIEDMAN, Dr. John B. Bowen, Dr. Hugh A. Sticksel, Jr., Dr. John W. Davis, Dr. Sal Mora, Defendants,

Texas Optometric Association, Inc., Intervenor.

No. B-75-277-CA.

United States District Court,
E. D. Texas,
Beaumont Division.

Sep. 12, 1977.

* * *

Before GOLDBERG, Circuit Judge, and FISHER and STEGER, District Judges.

MEMORANDUM OPINION

By this civil action, filed pursuant to, *inter alia*, 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343, 2281, *et seq.*, Plaintiffs seek to enjoin on constitutional grounds enforcement of provisions of the Texas Optometry Act,

Tex. Rev. Civ. Stat. Ann. art. 4552-1.01, *et seq.*, by the Texas Optometry Board ("Board"). More specifically, Plaintiffs assert the following are violative of their constitutional rights under the first and fourteenth amendments: (1) the prohibition against price advertising, Vernon's Ann. Civ. Stat. art. 4552-5.09(a); (2) the mandatory colloquy between the optometrist and his patient regarding referral to an optician, Vernon's Ann. Civ. Stat. art. 4552-5.15(e); (3) the composition of the Board, Vernon's Ann. Civ. Stat. art. 4552-2.02; and (4) the forbiddance of practice under a trade name, Vernon's Ann. Civ. Stat. art. 4552-5.13(d).

[1] Vernon's Ann. Civ. Stat. art. 4552-5.09(a) provides in pertinent part that "[n]o optometrist shall publish or display . . . any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials . . ." The recent decision of the Supreme Court in *Bates v. State Bar of Arizona*, ____ U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), makes it clear, however, that any blanket suppression of truthful price advertising is a violation of the right of commercial free speech. The Court therefore holds that art. 4552-5.09(a) is violative of the First Amendment.

[2] The Texas Optometry Act further provides that "[n]o optometrist shall practice . . . optometry under, or use in connection with his practice of optometry, any . . . trade name . . . other than the name under which he is licensed to practice optometry in Texas. . . ." Vernon's Ann. Civ. Stat. art. 4552-5.13(d). As noted above, Plaintiffs have asserted that this article infringes on their constitutional rights. More particularly, they allege that it transgresses on their right to commercial free speech

under the first amendment.[1] In deciding a first amendment question, the Court's function is to balance competing interests. That is, it must weigh the purported justifications for the restriction in question against its deprivation of first amendment rights and the subsequent harm, if any. See generally *Konigsberg v. State Bar*, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961); *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

[3] In the instant case, Defendants assert that in the first amendment balancing test, any possible harm to the public is far outweighed by (1) the dangers to the doctor/patient relationship, (2) the deterioration of the quality of eye care, (3) the practical "concealment" of the optometrists' identity, and (4) the potential for deception and misrepresentation inherent in an assumed name practice. Based on the evidence and briefs before this Court, the Court finds Defendants' assertions unpersuasive. Although the Defendants rely extensively on supportive language contained in the decision of the Texas Supreme Court in *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (1967), this Court notes (1) the question before the Texas Court in *Carp* was not constitutional but whether the Texas board

1. Plaintiffs also assert infringement of their fourteenth amendment rights. This Court notes, however, that the Supreme Court has consistently upheld commercial regulations by states in the face of fourteenth amendment challenges where the state action was grounded in rational bases. See, *e. g., New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Since the Court feels, however, that the first amendment challenge is dispositive of this question, it does not address the fourteenth amendment arguments of the parties.

had exceeded its delegated power from the Legislature, (2) the names whose use were in question were those of licensed optometrists who sold Carp their locations, and (3) the *Carp* decision was rendered well before the recent Supreme Court pronouncements in *Va. Pharmacy Bd. v. Va. Consumer Council, supra*, and *Bates v. State Bar of Arizona, supra.*

In both the *Bates* and *Virginia Pharmacy* decision, in the process of striking down blanket suppression of truthful advertising, the Supreme Court addressed at great length the importance of commercial free speech in society. The Court declared in *Bates* that "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates v. State Bar of Arizona, supra,* ____ U.S. at____, 97 S.Ct. at 2699. Further, that "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Ibid.* In *Virginia Pharmacy, supra* 425 U.S. at 765, 96 S.Ct. at 1827, the Court stated

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources . . . will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

There are two closely related arguments in the instant case for the inclusion of trade names within the protected

first amendment right of commercial free speech. The Court finds both persuasive. The first is that a "trade name" is encompassed within the meaning of advertising and thereby comes under the auspices of the first amendment protection recently granted to advertising by professional people. Therefore, it is argued that any blanket suppression of such commercial speech is unconstitutional. See *Bates v. State Bar of Arizona, supra.*

The argument for inclusion of trade names within the protective fold of advertising, is generally as follows: trade names, a common law right developed by virtue of being in business, grow as a result of the fact that people identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product.

The second argument is that, even if a trade name is not an integral part of advertising per se, there is a first amendment right to the use of a trade name as part of the consuming public's right to valuable information. More specifically, that the Texas State Optical name [TSO] has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services.

As stated above, the Court finds both arguments persuasive. Accordingly, this Court, applying the rationale of the advertising cases[2] to the trade name question, holds that blanket suppression of the use of trade names results in unwarranted restriction of the free flow of com-

---

2. See *Bates v. State Bar of Arizona,* ____U.S.____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

mercial information and therefore represents an unconstitutional violation of the first amendment.[3]

[4] Vernon's Ann.Civ.Stat. art. 4552-5.15(e) requires an optometrist, if he determines a patient needs lenses, to inform the patient (1) that the optometrist will prepare or have the lenses prepared according to the prescription, or (2) that the patient may have the prescription filled by any dispensing optician, not naming any particular optician, but should return for an optometrical examination of the lenses. The article further provides that "[i]f the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician. . . ."

Plaintiffs allege that this denies the optometrist the right under the First Amendment to furnish information as to where the patient can have his prescription filled, and that the patient is denied the right to obtain information from his optometrist as to where he can get his lenses made unless he accepts the statutorily required offer by the optometrist. Plaintiffs argue that the optometrist should be allowed to make a referral to a particular optician without the patient first requesting it. In addition, Plaintiffs allege a denial of equal protection because both opthamologists and osteopaths freely refer their patients

---

3. The Court would point out (1) that it rejects the contention that the TSO name misleads the public as to who is the responsible optometrist, *generally see Bates v. State Bar of Arizona, supra,* _____U.S. at_____, 97 S.Ct. 2691, and (2) the fact that blanket suppression of a trade name is unconstitutional does not prohibit or invalidate regulations having to do with the posting of the optometrists' names present, or the requirement that those optometrists whose names are posted work so many hours per week at their place of business.

to particular dispensing opticians. The Court does not find this article violative of Plaintiffs' constitutional rights.

Initially, the Court notes that first and fourteenth amendment rights are not absolute. As the Supreme Court observed in *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51, 81 S.Ct. 997, 1007, 6 L.Ed.2d 105 (1961),

> . . . general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, . . .

Evidence of a history of "kickbacks," economic tie-ins, and economic coercion peculiar to the optometric field provides a rational basis for a legitimate legislative purpose in enacting this article. See *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Further, by its wording, the clear purpose of this article appears to be to prevent the patient from being led to believe that the lens prescription must be taken to a particular optician, but instead requires that he be told that the optometrists can prepare or have the lenses prepared, *OR* that the patient may have the prescription filled by any optician he chooses. Therefore, the rationale of the recent Supreme Court cases involving advertising and first amendment rights is not applicable, since the effect of the article in question is not to restrict, but to

encourage the free flow of commercial information to consumers. *See Bates v. State Bar of Arizona, supra, and Virginia Pharmacy Board v. Virginia Consumer Council, supra.*

[5] Plaintiffs' equal protection allegations are also unpersuasive. As one three judge court observed in *Wall v. American Optometric Association, Inc.* D.C., 379 F.Supp. 175, 191 (1974), aff'd 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974), in rejecting an equal protection argument against distinguishing between ophthalmologists and optometrists,

> The equal protection clause of the Fourteenth Amendment does not require the state to treat different groups in the same manner. Only unreasonable discriminations are forbidden. *Williamson v. Lee Optical* [348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955)].

[6] Finally, the Court turns its attention to Vernon's Ann.Civ.Stat. art. 4552-2.02, which provides in pertinent part that "[a]t all times there shall be a minimum of two-thirds of the [Texas Optometry] board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association." Plaintiffs assert that the resulting "4-2" Board composition is a violation of their rights to equal protection and due process.[4] More specifically, Plaintiffs allege there is no

4. The intervening senior citizens also contend that the Board composition leads to statutory interpretations restricting advertising and other methods of communicating commercial information, thereby resulting in an abridgment of their first amendment rights. Whatever merit the senior citizens' claim may have had, the Court feels the argument is mooted by the Court's adherence, elsewhere in this decision, to *Bates v. State Bar of Arizona, supra.*

rational basis for the differentiation between Texas Optometric Association [TOA] and non-TOA optometrists which would justify the distinction made between them for Board membership. Therefore, Plaintiffs assert non-TOA members, though equally qualified, are denied equal access to the governing Board, and are thereby deprived of an equal opportunity to exercise political influence. Plaintiffs also contend that the board composition requirements are unconstitutional because they create an irrebuttable presumption that TOA members are two-thirds more likely to be qualified than non-TOA members. In addition, Plaintiffs allege that the composition of the board deprives them of procedural due process, since eventually non-TOA members could be brought or charged before a biased (in favor of TOA members) Board.

On the other hand, Defendants assert that the allegedly unique problems the optometry profession has had in the areas of quality of care, "kickbacks" and tie-ins, and economic control over many members of the profession, provide a rational basis for state regulation. More particularly, Defendants allege the following rational bases for the requisite board composition:

(1) TOA members are more likely to be economically independent than non-TOA members;

(2) TOA members have a greater likelihood of emphasizing the highest quality of eye care, as compared to non-TOA members; and,

(3) TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

In addressing Plaintiffs' equal protection arguments, the Court must bear in mind the deference which the judiciary gives to the legislative branch in the area of economic regulation. As the Supreme Court observed in a recent decision, *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976),

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, *e. g. Lehnhausen v. Lake Shore Auto Parts Co.* [410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)]. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

The Supreme Court has previously held that "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it . . .", *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961), and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940).

The Court rejects Plaintiffs' attempt to analogize the instant case with *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974), since (1) there the Court

was deadling with an inherently suspect classification (racial imbalance was involved), and (2) the basis of Plaintiffs' argument is found in a possible implication contained in dicta in the Supreme Court opinion.

Nor does the Court feel, in the face of Defendants' asserted rational bases, that Plaintiffs have carried the heavy burden required of them to prevail on equal protection grounds against state regulation.

The Court is also unconvinced by Plaintiffs' substantive due process arguments. Plaintiffs' reliance on three Supreme Court cases, *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973), *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), as a basis for their allegation as to the unconstitutionality of their alleged irrebuttable presumption is ill founded. As contrasted with this case, all three of the cited cases involved fundamental rights, to which the irrebuttable presumption analysis has been limited. In the instant case, the Court must follow the reasoning of those non-fundamental rights cases involving sovereign state regulation of economic matters. See, *e. g. New Orleans v. Dukes, supra; Williamson v. Lee Optical of Oklahoma, Inc., supra.* A further consideration in the Court's rejection of Plaintiffs' position is that this article does not conclusively deny any person a Board seat.

The Court also is unpersuaded by Plaintiffs' procedural due process arguments. As one Court has noted, "there is no federal constitutional requirement to the effect that legislators and rule makers must be free of bias or interest. . . ." *Wall v. American Optometric Association,*

Inc., supra. Wall and *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1972) are both readily distinguishable from the instant case for several reasons: (1) those cases were brought *after* the optometry boards in question had brought charges against the optometrist plaintiffs, therefore they speak directly only to the due process issues which surround disciplinary adjudications; (2) in those cases the board had rulemaking power, which they had exercised, while in the instant case the Texas Board has no rule-making power, but only power to enforce what the legislature has mandated; and (3) *all* members of those boards were members of the State Optometrical Association, while here one-third of the Board is composed of non-TOA members.

[7, 8] In deciding in the face of the instant challenge that Vernon's Ann.Civ.Stat. art. 4552-2.02 is not violative of the Constitution, the Court does not address the potential constitutional problems if, in the future, non-TOA members should be charged and brought for a hearing before the Board as presently composed. The Court feels compelled to point out, however, that it is clear "that those with substantial pecuniary interest in legal proceedings should not adjudicate [such] disputes." *Gibson v. Berryhill, supra.* Further, the Court points out that " '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.' K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited." *Id.* In addition, the Court would note that a constitutionally fatal bias in the statutory composition of a tribunal is not necessarily remedied by an offer of that tribunal to abdicate its statutory function. See *Wall v. American Optometric Association, Inc., supra.*

We have examined carefully all of Plaintiffs' other allegations and find each of them to be without merit.

Any finding of fact heretofore made which constitutes a conclusion of law is hereby adopted as a conclusion of law and any conclusion of law which is a finding of fact is hereby adopted as a finding of fact.

Counsel are directed to prepare an order in accordance with this Opinion.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-75-277-CA

DR. N. JAY ROGERS
Plaintiff;

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter,
Intervenor;

v.

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN W. DAVIS, DR. SAL MORA,
Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.,
Intervenor.

FINAL JUDGMENT

In accordance with the memorandum opinion of the Court dated September 12, 1977, in the above styled and numbered cause, it is the Order, Judgment, and Declaration of the Court that:

1. Section 5.09(a) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared

unconstitutional under the First Amendment of the United States Constitution insofar as it prohibits optometrists from making "any statement or advertisement of price of optometric services or materials." The members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same.

2. Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.

3. Section 5.15(e) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires a mandatory colloquy between the optometrist and his patient regarding referral to a dispensing optician; and such is not in violation of the First or Fourteenth Amendments of the United States Constitution.

4. Section 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas is declared constitutional insofar as it requires two-thirds of the Optometry Board members to be members of a state optometric

association which is recognized by and affiliated with the American Optometric Association; and such provision is not in violation of the First and Fourteenth Amendments of the United States Constitution.

5. Defendant's Motion to Dismiss for Improper Venue, as contained in Defendants' Amended Answer, is hereby overruled.

6. All other relief not herein specifically granted is denied.

7. The Court's finding of fact and conclusions of the law as set forth in the Court's memorandum opinion dated September 12, 1977, are hereby incorporated herein.

8. This judgment shall be considered for purposes of appeal and otherwise, as a final judgment in this case.

9. All parties shall pay costs as heretofore incurred and expended by them, respectively.

10. Judgment is not stayed pending the appeal hereof, with the caveat to all parties acting in reliance upon the Court's findings of constitutionality and unconstitutionality that the Court's rulings are subject to final adjudication upon appeal.

SIGNED this 27th day of October, 1977.

/s/ IRVING L. GOLDBERG
United States Circuit Judge

/s/ JOE J. FISHER
United States District Judge

/s/ WILLIAM M. STEGER
United States District Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-75-277-CA

DR. N. JAY ROGERS
Plaintiff;

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association,
Port Arthur, Texas Chapter,
Intervenor;

v.

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN W. DAVIS, DR. SAL MORA,
Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.,
Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dr. N. Jay Rogers, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the portion of the Final

Judgment entered in this action on October 27, 1977 that upholds the constitutionality of Sections 5.15(e) and 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, and denying the prayer for injunction prohibiting enforcement of said statutes.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Plaintiff

By /s/ ROBERT Q. KEITH
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. B-75-277-CA

DR. N. JAY ROGERS
Plaintiff;

W. J. DICKINSON, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter,
Intervenor;

v.

DR. E. RICHARD FRIEDMAN, DR. JOHN B. BOWEN, DR. HUGH A. STICKSEL, JR., DR. JOHN W. DAVIS, DR. SAL MORA,
Defendants;

TEXAS OPTOMETRIC ASSOCIATION, INC.,
Intervenor.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that W. J. Dickinson, Individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, the Intervenor above named, hereby appeal to the Supreme Court of the United States from the portion of the Final Judgment entered

in this action on October 27, 1977 that upholds the constitutionality of Sections 5.15(e) and 2.02 of the Texas Optometry Act, Article 4552, Revised Civil Statutes of Texas, and denying the prayer for injunction prohibiting enforcement of said statutes.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
Attorneys for Intervenor

By /s/ ROBERT Q. KEITH
Of Counsel

1400 San Jacinto Building
Beaumont, Texas 77701

APPENDIX C

Art. 4552-2.02. Qualifications of members

To be qualified for appointment as a member of the board, a person must be a licensed optometrist who has been a resident of this state actually engaged in the practice of optometry in this state for the period of five years immediately preceding his appointment. A person is disqualified from appointment to the board if he is a member of the faculty of any college of optometry, if he is an agent of any wholesale optical company, or if he has a financial interest in any such college or company. At all times there shall be a minimum of two-thirds of the board who are members of a state optometric association which is recognized by and affiliated with the American Optometric Association.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 2.02, eff. Sept. 1, 1969.

Art. 4552-2.09. Suit for injunction

The board may sue in its own name to enjoin the violation of any provision of this Act. This remedy is in addition to any other action, proceeding, or remedy authorized by law.

Acts 1969, 61st Leg., p 1298, ch. 401, § 2.09, eff. Sept. 1, 1969.

Art. 4552-2.10. Proceedings; subpoenas; oaths

The board, any committee or any member thereof, shall have the power to issue subpoenas and subpoenas

duces tecum to compel the attendance of witnesses and the production of books, records and documents, to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The board shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain it.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 2.10, eff. Sept. 1, 1969.

Art. 4552-2.14. Rules and regulations

The board shall promulgate procedural rules and regulations only, consistent with the provisions of this Act, to govern the conduct of its business and proceedings. Notwithstanding any other provision of this Act, the board shall not have any power or authority to amend or enlarge upon any provision of this Act by rule or regulation or by rule or regulation to change the meaning in any manner whatsoever of any provision of this Act or to promulgate any rule or regulation which is in any way contrary to the underlying and fundamental purposes of this Act or to make any rule or regulation which is unreasonable, arbitrary, capricious, illegal, or unnecessary.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 2.14, eff. Sept. 1, 1969.

Art. 4552-3.01. Must pass examination

Every person hereafter desiring to be licensed to prac-

tice optometry in this state shall be required to pass the examination given by the Texas Optometry Board.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 3.01, eff. Sept. 1, 1969.

Art. 4552-3.06. Conduct of examination

All examinations shall be conducted in writing and by such other means as the board shall determine adequate to ascertain the qualifications of applicants and in such manner as shall be entirely fair and impartial to all individuals and every recognized school of optometry. All applicants examined at the same time shall be given the same written examination.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 3.06, eff. Sept. 1, 1969.

Art. 4552-3.07. Those passing entitled to license

Every candidate successfully passing the examination and meeting all requirements of the board shall be registered by the board as possessing the qualifications required by this law and shall receive from this board a license to practice optometry in the state.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 3.07, eff. Sept. 1, 1969.

Art. 4552-4.04. Revocation, suspension, etc.

(a) The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:

(1) the applicant or licensee is guilty of gross immorality;

(2) the applicant or licensee is guilty of any fraud, deceit, dishonesty, or misrepresentation in the practice of optometry or in his seeking admission to such practice;

(3) the applicant or licensee is unfit or incompetent by reason of negligence;

(4) the applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;

(5) the applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

(6) the licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this state, to so practice;

(7) the licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;

(8) the licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;

(9) the licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this state;

(10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;

(11) the licensee has willfully or repeatedly represented to the public or any member thereof that he is authorized or competent to cure or treat diseases of the eye;

(12) the licensee has his right to practice optometry suspended or revoked by any federal agency for a cause which in the opinion of the board warrants such action;

(13) the applicant or licensee has been finally convicted of violation of Article 773 of the Penal Code.[1]

(b) Proceedings under this section shall be begun by filing charges with the board in writing and under oath. Said charges may be made by any person or persons. The chairman of the board shall fix a time and place for a hearing and shall cause a copy of the charges, together with a notice of the time and place fixed for the hearing, to be served on the respondent or his counsel at least 10 days prior thereto. When personal service cannot be effected, the board shall cause to be published once a week for two successive weeks a notice of the hearing in a newspaper published in the county wherein the respondent was last known to practice, and shall mail a copy of the charges and of such notice to the respondent at his last known address. When publication of the notice is necessary, the date of hearing shall not be less than 10 days after the last date of the publication of the notice.

(c) At said hearing the respondent shall have the right to appear either personally or by counsel, or both, to produce witnesses and evidence on his behalf, to cross examine witnesses and to have subpoenas issued by the

---

1. See, now, art. 4505a.

board. The board shall thereupon determine the charges upon their merits.

(d) Any person whose license to practice optometry has been refused or has been revoked or suspended by the board may, within 20 days after the making and entering of such order, take an appeal to any of the district courts of the county of his residence, but the decision of the board shall not be stayed or enjoined except upon application to such district court after notice to the board.

(e) Upon application, the board may reissue a license to practice optometry to a person whose license has been revoked but such application shall not be made prior to one year after the revocation and shall be made in such manner and form as the board may require.

(f) Nothing in this Act shall be construed to prevent the administrator or executor of the estate of a deceased optometrist from employing a licensed optometrist to carry on the practice of such deceased during the administration of such estate nor to prevent a licensed optometrist from working for such person during the administration of the estate when the legal representative thereof has been authorized by the county judge to continue the operation of such practice.

Acts 1969, 61st Leg., p. 1298, ch. 401, § 4.04, eff. Sept. 1, 1969.